

**DISTRICT COURT OF THE VIRGIN ISLANDS**

**DIVISION OF ST. CROIX**

UNITED STATES OF AMERICA,

Plaintiff,

Crim. No. 2002/125

v.

JAY WATSON, et. al.,

Defendants.

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**ORDER GRANTING MOTION FOR DISQUALIFICATION  
OF DEFENDANT'S ATTORNEY**

THIS MATTER is before the Court on the government's motion to disqualify Attorney Jomo Meade, counsel for defendant Jay Watson. Attorney Meade filed a response. A hearing was held on December 13, 2002.

In support of its motion, the government argues that Attorney Meade has represented one government witness, and is currently representing another witness in this action.<sup>1</sup> The government claims that these witnesses have interests adverse to that of Attorney Meade's current client, Jay Watson. At the hearing, the government confirmed that it plans to call Attorney Meade as a witness with regard to the plea agreement with Meade's other current client. The government reasons that Meade's role as advocate for Watson and counsel for the witness presents an irreconcilable conflict of interest precluding Attorney Meade from representing defendant Watson in this matter.

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<sup>1</sup>The witnesses are identified as drug dealer No. 1, Algernon Zephir (See Indictment, Acts Pertaining to No. 1, 1-8; and drug dealer No. 5, Sylvester Christopher (See Indictment, Acts Pertaining to No. 5, 23-33).

Attorney Meade argues that there is no conflict. First, Meade states that he was retained by the first witness, Zephir, to file a common law tort action against NSF officers Tyson and Degrasse, only. Meade insists that no other NSF officers were mentioned. Meade further states that the action was dismissed for lack of prosecution because the witness, Zephir, refused to cooperate with him. Meade argued that Zephir's expected testimony against Tyson and DeGrasse is consistent with Watson's theory of the case.

With regard to the second witness, Meade states that although he represents Christopher in a criminal action in which he was charged with the possession of drugs Christopher entered into a plea agreement with the government against Meade's advice. Meade is Christopher's counsel of record and will represent him at sentencing. Meade states that he was not present during the negotiations and discussions leading up to the plea agreement. He acknowledges that the agreement requires Christopher to testify against Watson<sup>2</sup> and that Christopher is entitled to his counsel while testifying. However, he claims that a better solution would be to withdraw from the Christopher case.<sup>3</sup>

Finally, Meade argues that, under the facts of this case, he is not a necessary witness because Watson was not involved with the first case, and he lacks personal

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<sup>2</sup>The allegations concerning Christopher in this matter directly implicate defendant Watson in criminal activity.

<sup>3</sup>Attorney Meade was retained as Christopher's attorney and has acted in this capacity since May 2, 2000. He has not moved to withdraw. (See, STX Crim. No. 2000/68; 2000/38 and Mag. No. 2000/49).

knowledge of Christopher's plea agreement in the second case. He further argues that Watson is aware of the facts and has waived his right to conflict free representation. Zephir and Christopher have not waived any conflict of interest.

## DISCUSSION

The Sixth Amendment right to effective representation is compromised where an attorney representing a criminal defendant harbors an actual conflict of interest which will adversely affect his performance. *Cuyler v Sullivan*, 446 U.S. 335 (1980). The cases instruct that an actual conflict of interest exists if "during the course of the representation, the defendants' interests [would] diverge with respect to a material factual or legal issue or to a course of action." *Sullivan v. Cuyler*, 723 F.2d at 1086. To reach the level of constitutional ineffectiveness the conflict "must cause some lapse in representation contrary to the defendant's interests but such lapse need not rise to the level of actual prejudice." *Id.* A lapse in representation adversely affecting the defendant's interests can be demonstrated not only by what the attorney does, but by what he refrains from doing. *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978); *Duncan v. Morton*, 256 F.3d 189, 197 (3d Cir. 2001).

The issue is whether disqualification is warranted where counsel for defendant represents government witnesses in the same or related matter. In *United States v. Provenzano*, 620 F.2d 985 (3d Cir. 1980), the Court disqualified an attorney from representing the defendant because the attorney had also represented a key witness against the defendant. Although the current defendant purported to

waive the conflict, the Court relied on its supervisory powers to reject the waiver.

The Court reasoned that any cross examination of the government witness/former client would intrude into areas protected by the attorney-client privilege. *Id. at 1000.*

The Court also assumed that confidential communications were exchanged during the former representation. *Id. at 1001.*

In *United States v. Cannistraro*, 794 F.Supp.1313 (D.N.J. 1993), the government filed a motion to disqualify defense attorney prior to trial. The Court found that the counsel's prior representation of two potential government witnesses presented a conflict of interest which could not be cured by waiver. *Id. at 1324.* First, the Court reiterated the Third Circuit's refusal to accept waivers of conflicts of interest whether actual or potential. *Id. at 1318 (citing cases).* Next, the Court discussed the difficulty of realizing the true nature of a conflict prior to trial. However, based on the fact that the client stated that he had exchanged confidential information to the attorney; the fact that the government planned to call the attorney as a witness regarding his prior representation of the witnesses; and the fact that the attorney was tangentially involved in the underlying criminal activity, the Court granted the motion to disqualify. *Id. at 1320-24.*

In *State of North Carolina v. James*, 433 S.E.2d 755 (Ct.App.N.C. 1993), the defendant was convicted of second degree murder. At trial, he was represented by an attorney who had previously represented an individual who turned out to be a key government witness at the defendant's trial. On appeal the defendant argued that

his counsel's dual representation of him and the government witness was a conflict of interest in violation of his 6<sup>th</sup> Amendment right to counsel.

The Court characterized the issue as a conflict pursuant to *Cuyler v. Sullivan*, and reasoned that in such a situation, confidential information gleaned by the attorney from either or both of the clients would be implicated. The court also reasoned that cross examination of an impeaching nature would be compromised as the "attorney tries to perform a balancing act between two adverse interests." *Id. at* 790. The court noted that the counsel in that case did not vigorously cross examine the witness. Prejudice was presumed and the case was remanded for a new trial. *Id. at* 791.

The cases indicate that the existence of a conflict is not a reason for automatic disqualification. Courts look at factors such as the nature of the dual representation; whether the counsel plans to do anything or just be passive with information involving both clients; whether confidential communications were exchanged; whether counsel will be called as a witness; and whether there is a defense strategy that cannot be pursued because of the dual representation.

The cases in this circuit are not tolerant of conflicts and are especially cautious when ruling on a disqualification motion prior to trial. The following discussion in *Cannistraro* sums it up:

"[T]rial courts confronted with multiple representations face the prospect of being 'whipsawed' by assertions of error no matter which way they rule." *Id.* Where multiple representations are allowed,

advocacy of counsel is impaired and the defendant may assert a claim for ineffective assistance of counsel regardless of whether the defendant waived his or her right to conflict-free representation. *Id.* at 161-62, 108 S.Ct. at 1698-99. If multiple representation is prohibited, the defendant may raise a Sixth Amendment violation. *Id.* at 161, 108 S.Ct. at 1698. The independent interest of the trial court "in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them," *id.* at 160, 108 S.Ct. at 1698, the "institutional interest in the rendition of just verdicts in criminal cases," *id.*, as well as the "interest of a criminal defendant," *id.*, require flexibility in the trial court to decline a proffer of waiver if it justifiably finds an actual or potential conflict. *Wheat v. United States*, 486 U.S. 153, 162-63 (1988)."

The Court continued,

Unfortunately for all concerned, a district court must pass on the issue whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pretrial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. *It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial for what each of the Government's witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants.* These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics. *Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them.* *Wheat*, at 162-63 (emphasis added).

*Id.*

In the instant case Meade's former and current clients are witnesses against his current client. Despite Meade's protestations that the former client (Zephir)

made no charges against Watson, the allegations were made against Watson's fellow officers who are charged, together with Watson, with conspiracy to violate individuals' civil rights. Those allegations are directly related to the instant charges.

Additionally, Meade continues to represent the second witness, Christopher. Christopher has agreed to testify and his testimony will be adverse to Watson. Further to his plea agreement it will be in Christopher's interest to be believed and it is Watson's interest to portray him as a liar. Thus, Attorney Meade will be placed in the untenable position of discrediting one client in defense of the other. Even acting as "second chair" as Meade asserts he will, the conflict will be apparent to the jury and prejudicial to his clients.

Moreover, the Government insists that it will call Meade as a witness to testify regarding Christopher's plea. As Christopher's counsel, Meade will be called on to testify regarding the plea agreement. This could lead to immense jury confusion and compromise the fairness of the trial. As the Court stated in *Cuyler*, such divergence of the interests of his two clients on a material legal issue, warrants disqualification. Additionally, Christopher has not waived the conflict. Meade has acknowledged that Attorney Stephen Bruschi is Watson's principal attorney and that he (Meade) is only "second chair". Accordingly, potential prejudice to Watson is minimized.

Based on the foregoing, it is hereby

ORDERED that the government's motion to disqualify Attorney Meade as counsel for defendant in this matter, is GRANTED.

*USA v. Watson, et. al.*  
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*Defendant's Counsel*  
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DATED: December 16, 2002 ENTER:

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JEFFREY L. RESNICK  
U.S. MAGISTRATE JUDGE

A T T E S T:  
Wilfredo F. Morales, Clerk of Court  
by: \_\_\_\_\_  
Deputy Clerk

cc: AUSA Denise Hinds  
Asha Colianni, Esq.  
Jomo Meade, Esq.  
Stephen Bruschi, Esq. (FAX 776-2238)  
Chief Judge Finch & Law Clerk